LIBRARY
SUPREME COURT, U. S.

FILED
JAN 15 1970
JOHN F. DAVIS, CLERK

No. 893

In the Supreme Court of the United States

OCTOBER TERM, 1969

BELL LINES, INC., ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
ROBERT B. NICHOLSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Deputy General Counsel,
NAHUM LITT,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 893

BELL LINES, INC., ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court (J.S. App. B) dismissing a complaint brought to set aside certain orders of the Interstate Commerce Commission (J.S. App. C, G and H). Those orders, issued pursuant to Section 210a(a)

of the Interstate Commerce Act, 49 U.S.C. 310a(a),[1] granted temporary authority for Transamerican Freight Lines to conduct motor common carrier operations between its presently authorized eastern and central state territory and certain points in Georgia and the Carolinas.

Pursuant to the Commission's temporary authority rules, 49 C.F.R. 1131.2(c), Transamerican's application was supported by almost 400 shippers who supplied verified statements attesting to an immediate and urgent need for the proposed service and the unavailability of existing service adequate to their needs. The letters from the shippers detailed the inadequacy of service by existing carriers and cited the refusals of various carriers to perform the service they desired (J.S. App. 31, 330). Appellants, a number of competing regular route motor carriers, opposed the application, claiming that they could perform the needed service.

Transamerican's request for temporary authority was initially denied by the Commission's Temporary Authorities Board, by order of July 13, 1967, and Division 1, acting as an Appellate Division, denied a petition for reconsideration on September 27, 1967. Transamerican then filed with the Commission a Petition for Receipt of Additional Evidence and

---

[1] The statute provides that

> "to enable the provision of service for which there is an immediate and urgent need . . . the Commission may, in its discretion and without hearing or other proceedings, grant temporary authority for such service or a portion thereof or any part thereof, as to which the Commission finds that"

for Reconsideration," and Division 1 set aside its earlier order, found an immediate and urgent need for the service and granted the application by order of December 5, 1967 (J.S. App. 22). The district court stayed that order on January 5, 1968, and held a hearing on the merits on January 19, 1968.[2]

Nineteen months thereafter, on September 19, 1969, the district court issued its unanimous opinion (J.S. App. A) sustaining the Commission's findings in all respects. The court held: (1) that the application was supported by shippers' statements complying with the Commission's temporary authority rules (J.S. App. 31, 34), and (2) that the Commission could properly reconsider its prior rulings and reverse itself as a result of "* * * inter-agency consideration and reconsideration [which] constitute essential ingredients of the administrative process * * *" (J.S. App. 35).

Subsequent to the filing of the court's opinion, appellants asked the district court for a stay of entry of judgment to enable them to seek reconsideration from the Commission or, in the alternative, to obtain an order from the court directing the Commission to reconsider the matter. The Commission accepted for

[2] At the same time appellants sought judicial review, they also sought reconsideration, oral argument and certification of the proceeding to the entire Commission. These were denied by Division 1 in its order entered December 29, 1967. Petitions seeking a declaration that the issues were of general transportation importance subsequently were also denied. Various requests by the court to delay entry of the Commission's order were acceded to by the Commission solely to enable the court to hear the matter.

filing their extraordinary petitions, which alleged
the record had become stale and that circumstan
had changed. After considering the merits of the
tition, the Commission, by order entered October
1969, reaffirmed its earlier finding of immediate
urgent need for Transatlantic's service. On Oc
22, 1969, after a further hearing on applica
tacks on the Commission's order of October 17
on various motions seeking another court hearing
further stay of judgment, the court gave judgm
for the Commission, but granted appellants 30 days
which to seek a stay from this Court (J.S. App.
[illegible] 21). On November 21, 1969, the Chief Justice den
appellants' requests for a stay.

ARGUMENT

I. Appellants' principal contention here (J.S.
10), as it was below, is that the Commission was
quired as a matter of law to reject Transatlantic's
application because the statements of shippers
porting that application did not literally comply
the Commission's temporary authority regulati
These regulations require that supporting shippers
declare with some degree of specificity the service
cilities they have experienced, the efforts they h
made to obtain service from existing carriers, and
results of such efforts. [illegible] C.F.R. 1132.2(a)(1)(ii)
J.S. 13-14; J.S. App. 64-66). The district court
missed these contentions, holding that some of the
porting letters "[illegible] respond to every requirement
the rules [illegible]" (J.S. App. 31). The court stat

concluded that the Commission's grant of tempo
authority was "supported by the evidence in the
ord" (J.S. App. 38).

There is thus no conflict between the decision in
case and the decisions of the District Court for
Western District of Washington in *Lens Cleaning*
v. United States, 280 F. Supp. 133, and *Black*
Freight Service v. United States, 298 F. Supp.
probable jurisdiction noted, October 27, 1969,
382 and 389, this Term. In those cases the court f
that *no* supporting letter from any shipper
proaches compliance with or provides the inform
required [illegible] by the Commission's regulations
Cochran Co., supra, 280 F. Supp. at 136; see
Black Ball Freight, supra, 298 F. Supp. at
1014. Here, however, the record below establi
nearly 100 letters sent by [illegible] and with
letter service and stated that [illegible]
the [illegible]

petitants next contend (J.S. 9, 12) that the sion improperly reopened this proceeding for eration on the basis of "successive petitions," violations of the Commission's General Rules tice, 47 C.F.R. 1.108, 1.401, and the Administra- cedure Act, 5 U.S.C. (Supp. IV) 557. No such ion can be shown. The Commission's regula- ifically provide for such rehearing or reconsid- ion upon petition (47 C.F.R. 1.108, 1.401(h)), and petitions fully met the requirements of ... subject to any cumulative or successive ... [illegible] ... petitioners' petitions, affidavits, ... [illegible] ... (J.S. App. 23). The Commission ... [illegible] ... and reconsideration ... [illegible] ... of the administrative pro- ... [illegible] ... and to bring uniformity and ... [illegible] ... the various factors which it ... [illegible] ... the exercise of the agency's final ... [illegible] ... App. 23a). The court was ... [illegible] ... of the Administrative ... [illegible] ... did not apply ... [illegible] ... the requisite statutory

Additionally, Section 17(7) of the Act, 49 U.S.C. 17(7), gives the Commission continuing jurisdiction over its orders and clearly empowers it to rehear or reconsider and to rescind, change, or modify such orders at any time for the purposes of correcting an error or injustice. See, *e.g.*, *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 483–484; *Sprague v. Woll*, 122 F. 2d 128, 130 (C.A. 7), certiorari denied, 314 U.S. 669; 2 Davis, *Administrative Law Treatise*, 18.09, pp. 606–610. The Commission's decision, after further deliberation, to grant the application upon a reopened record is fully consistent with sound practice and well-established law. *Resort Bus Lines, Inc. v. Interstate Commerce Commission*, 264 F. Supp. 742, 745 (S.D.N.Y.).

United Co. v. Pennsylvania R.R. Co., 381 F. 2d 4 (C.A. 1), cited by plaintiff, was an extreme case in which the court determined that the Commission had exceeded its power in reopening a reparation case decided nearly three years earlier in order to "apply retroactively its new policy" and stated that such a delayed action "would result in grave and unwarranted uncertainty of action for those who must rely on its finality." *Id.* at 10. However, new policy matters were involved; the parties were still before the Commission; Transamerican had filed appropriate petitions under the Commission's regulations; and no

"uncertainty" existed which could have led to detrimental reliance by any party on the Commission's order. The district court properly found that *Upjohn* was not pertinent (J.S. App. 35).

3. Finally, appellants contend that the district court erred in not (1) ordering the Commission to consider their extraordinary petitions for reconsideration filed subsequent to the court's opinion entered September 19, 1969; or (2) finding that the Commission's order denying the extraordinary petitions was improper (J.S. 18, 19). The answer to the first argument is that the Commission did consider appellants' extraordinary petitions on the merits and denied the relief sought prior to the second district court hearing on October 22, 1969 (J.S. App. 11). Appellants can hardly fault the district court for not ordering the Commission to do what it had already done.

Nor was there any basis for requiring that the Commission reverse its grant of authority. Appellants allege that the passage of some 19 months between argument and disposition of the case in the district court caused the record to become stale; and they also point to recommendation by a Commission examiner that a corresponding permanent application be denied. But whenever judicial review, and a judicial stay, of a temporary authority are sought, a significant delay may result; that is in itself no reason for disapproving the authority on the merits. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514, 515. And here the Commission has specifically found that appellants made no showing that

its order should be changed. The examiner's repo
on Transamerican's separate request for permane
authority, whether favorable or unfavorable to appe
hants, is but one step in an uncompleted administra
tive proceeding, and it may or may not become t
ultimate decision of the Commission. Surely it is
basis for interfering with the Commission's ord
granting temporary authority and its subsequent fin
ing that the need has remained unabated.

CONCLUSION

The judgment of the court below should be affirme
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. MCLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
ROBERT B. NICHOLSON,
Attorneys,

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Deputy General Counsel,
NANCY LITT,
Attorney,
Interstate Commerce Commission.
JANUARY 1970.